No. 15,019

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL ELIZABETH SCRUGGS, ATLEE GAIL SCRUGGS, MERI-JO ABRAMS and LOUIS EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEES.

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Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

Appellees accept appellant's jurisdictional statement.

STATEMENT OF THE CASE.

Appellees do not controvert the Statement of the Case made by Appellant in his brief.

SUMMARY OF ARGUMENT.

Regardless of the rule in other jurisdictions, under the common law of Hawaii a cause of action exists in favor of appellees for pecuniary loss resulting from the deprivation of support, loss of care, attention, acts of kindness, comfort, solace of the society of their mother, her counsel and advice.

The numerous cases cited by Appellant in support of his Argument (1) (Appellant's Brief, pp. 4-11) are inapplicable to this case, and are of absolutely no aid in determining the issues of this case. The Court of Hawaii held in *Gabriel v. Margah* (1947), 37 Hawaii 571:

> "Whatever may be the juridicial conclusions in other jurisdictions of the right to recover damages for the deprivation of those incidents of the legal relations of the husband and wife or parent and child which are difficult of exact estimation and to which no standard of value is applicable, such as deprivation of a wife of the society, comfort and fellowship of her husband, or the deprivation of parents of acts of kindness and attention, association, comfort and presence of their deceased minor child, we are confined to, and the solution of the questions here involved is governed by, the measure of damages of the cause of action adopted in the Kake case and the necessary and reasonable implications thereof."

The learned trial judge followed the well-established law created by the Supreme Court of the Kingdom of Hawaii in 1860.

ARGUMENT.

(1) THE COMMON LAW OF HAWAII RECOGNIZES THE CLAIM HERE ASSERTED.

In *Kake v. Horton,* 2 Hawaii 209 (1860), the Court held that a wife can maintain a cause of action to recover for consequential damages resulting to her by reason of the death of her husband caused by the wrongful act of the defendant, and she was allowed to recover for loss of support and the deprivation of the society, comfort, and fellowship of her husband. The Court held (at p. 213):

> "The principle which we now recognize will become, by judicial adoption, a valuable part of the common law . . ."

In extending the common law of Hawaii in *Ferreira v. Honolulu R.T. & L. Co.,* 16 Hawaii 615 (1905), the Court found:

> "It is true that in the cases cited the actions were by widows for the deaths of their husbands, but the reasoning upon which the decisions were based is equally applicable to actions by parents for the deaths of their children." (at 628)

The Hawaiian courts recognized the existence of a cause of action under the common law of Hawaii where a recognized legal duty within the family relationship existing between the party bringing the action and the injured party is infringed by the wrongful act of another. Thus, the Court held in *Hall v. Kennedy,* 27 Hawaii 626 (1923), that a parent could not maintain an action to recover damages for the death of an adult child, even though such parent may

have been dependent upon the adult child, since there was no legal right belonging to the parent which was infringed upon by reason of the wrongful act of the tort-feasor. The Court commented:

> "In Kake v. Horton, the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the Ferreira case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained. Upon reaching majority a child is under no legal duty of supporting his parent and the parent has no legal claim upon the earnings of his child after majority. In the instant case it is asserted that the deceased was the sole support of plaintiffs, but no legal duty or obligation was on deceased to support plaintiffs." (at p. 629, 630)

Here appellees interpose that it is obvious Hawaii intends to protect all legal interests and incidents of the family, for promptly in 1923, the same year the *Hall* case, supra, was decided, the Legislature enacted House Bill 395 which afforded plaintiffs such as in the *Hall* case a cause of action based upon dependency. The judiciary committee of the senate of this session

of the legislature reported, and the Court held in *Gabriel v. Margah,* supra, at page 579:

> "This Bill enlarges the right of suit and recovery for death by wrongful act. . . . It enlarges the common law recovery which we believe to be too limited." (Sen. Journal Hawaii, 12 Legis. Reg. Sess. 1923, p. 977.)

And under the most recent case brought under this Act (as amended and then in effect), *Ginoza v. Takai Elec. Co.,* (1955), 40 Haw. 691, the Court permitted recovery by the wife for loss of support and wellbeing, and allowed the children to recover for the loss of support, maintenance, education, nurture, care and training, the same incidents recoverable under the common law of Hawaii hereinbefore set forth. Chief Justice Towse said in that case, at page 709:

> "That damages may be awarded for such loss is settled in this jurisdiction."

The 1955 Legislature of Hawaii, by Act 205, effective May 27, 1955, further amended the statutory action incorporating specific provisions permitting recovery for pecuniary injury and loss of love and affection, including loss of society, companionship, comfort, consortium or protection, loss of marital care, attention, advice or counsel, loss of filial care or attention, or loss of parental care, training, guidance or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.

And while in the *Hall* case, supra, decided in 1923, the Court held that where no legal right is infringed, no right of action could be maintained under the common law of Hawaii, had the Hall plaintiffs sustained loss subsequent to the enactment of Act 66, Session Laws of Hawaii 1933, reading in part:

> "The adult children of any person who for any reason is incapable of self-support shall be liable, to the extent of their financial ability, for the support of such person. . . ."

they would have undoubtedly had an action under the common law of Hawaii.

In 1947, in ruling in *Gabriel v. Margah,* 37 Hawaii 571, which is the latest word on the Hawaiian common-law action, the Court held:

> ". . . the cause of the action adopted in the Kake case and applied in that case to the relation of husband and wife, and in the Ferreira case to the relation of parent and minor child, is based upon the statutory legal incidents of the relation pre-existing between the plaintiff and the deceased and the reciprocal legal rights and duties of the parties attached to such relation.
>
> The *reciprocal* rights and duties attached to the respective relations of husband and wife and of parent and minor child . . . have, since the decision in the Kake case, remained substantially the same. . . ."

Of course, the cases decided under the common law of Hawaii involved death. However, the cause of action adopted in the *Kake* case, and extended in the

subsequent cases heretofore discussed, was not based on the requirement of a total loss. It was based upon an invasion of a legal right, and recovery may be had for a temporary loss, as well as for permanent loss, depending on the facts of each particular case. Even under the English common law a husband could recover of the tort-feasor for the loss of his wife's society and the distress of mind he had suffered on her account by reason of injuries sustained by her. In *Baker v. Bolton, et al.,* 1 Campbell's Rep. 494, in an action against the proprietors of a stage coach in which the plaintiff and his wife were travelling when it overturned, plaintiff himself was much bruised and his wife was so severely hurt that she died about a month thereafter; the jury was instructed that the husband could recover for the bruises which plaintiff himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident until the moment of her dissolution. Under the English common law, the husband could not, however, recover for his damages as a result of her death.

The common law of Hawaii, as distinguished from the common law of England, affords such widowers a cause of action, which has been extended, in the cases hereinbefore cited, to include minor children. As heretofore shown, Hawaiian cases have recognized the *reciprocal* rights and duties attached to the respective relations of husband and wife and of parent and minor child, the invasion of which gives rise to a cause of action.

In the case at bar, there are, contrary to Appellant's statement appearing on page 17 of his brief, legal rights infringed upon. The Appellees are entitled, under Section 12264 (set forth on page iii of the Appendix to Appellant's Brief), to have their mother "set a good example before" them, provide them with support and education, instruct them in a knowledge of religion, keep them from idleness and vice of all kinds, inculcate them with habits of industry, economy and loyalty. In ruling in the *Gabriel* case, supra, on the statutory legal rights and duties attached to the relations of parent and minor child, the Court found acts of kindness and attention, among other things, to be part of the *reciprocal* rights and duties attached to such relation.

Indeed, the specific loss of these reciprocal rights are now spelled out in the statutes of Hawaii, particularly by the adoption of Act 205, S.L. 1955, to include the pecuniary injury and loss of love and affection, including the loss of society, companionship, comfort, consortium or protection, loss of marital care, attention, advice or counsel, loss of filial care or attention, and loss of parental care, training, guidance or education.

Appellees allege in their Complaint (R. p. 5) that the injuries to their mother resulted in "loss to plaintiffs of support, maintenance, education, nurture, care, and training which their mother would have given them during said period, all to their damage in the sum of $106,000.00." Further, that they "were partially deprived of the association, care, attention, acts

of kindness and the comfort and solace of her society;" that due to the partial disability to their mother caused by the injuries to her, appellees "will continue to be partially deprived of the association, care, attention, acts of kindness and the comfort and solace of her society, by reason of the permanent nature of said disability to their mother." (R. p. 5, para. IV.)

Section 10485, respecting tort liability, provides:

> "Except as otherwise provided, all persons residing or being in the *Territory* shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their wives, children under majority, or wards, by such offending party, or by his wife, or his child under majority, or by his command, or by his animals, domitae or ferae naturae; and the party aggrieved may prosecute therefor in the proper courts."

Except for the italicized amendment the law was the same Section 1125, Civil Code 1859, under which the *Kake* case was decided. Under this same statute, Appellees contend that Appellant (the offending party) is personally responsible to them for the pecuniary injury or loss occasioned them, be it termed "direct or consequential".

Commenting upon this same statute of 1859 then in effect, the Court said in the *Kake* case:

> "They (counsel for defendant) treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery, committed on her deceased husband,

> Charlie Pihaole; whereas, as we understand the matter, it is an entirely different thing, being *an action on the case, to recover for consequential damage resulting to the plaintiff* by reason of the death of her late husband, which she alleges to have been caused by the wrongful act of the defendant, Horton." (at p. 210)

Appellant urges that the common law of Hawaii applies only in cases of death. Let us assume that a sole surviving parent is rendered not only permanently and totally disabled according to the most competent medical prognosis, but also hopelessly incompetent, to a point where he does not even recognize his own minor children. Will the minor children be deprived of a cause of action, despite the liberal judicial history of Hawaii, simply because their parent was not killed, though he be in a state of living death? Appellees urge that the common law of Hawaii is based on the invasion of the legal right, and is not dependent on death. Pecuniary loss of the legal right to receive support and education, nurture, care, training, acts of kindness and the comfort and solace of society, exists whether or not there be death, and it is that loss which is measured under the circumstances of the instant case. Of course, if death should be the result, the losses would be permanent and greater, and, accordingly, a judgment should naturally be greater.

The learned trial judge said in his "Ruling on Motion to Dismiss" (R. 15):

> "The decided cases to date to be sure have all been wrongful death cases. However, the cause of

> action is not founded upon the degree or quantity of the loss. Rather is it premised upon an invasion of a right. So it is that both logic and the law agree that redress may be had for a temporary impairment as well as for the total destruction of a right incident to the family relationship."

Appellees repeat the Court's comment in the *Hall* case, supra:

> "In Kake v. Horton, the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant."

As has been shown, and will be shown in Argument (2) following, the Hawaiian common law as expounded in the *Kake* case is the law in Hawaii, regardless of what it might be in other jurisdictions. In other words, in the *Kake* case, "the legal right of the wife for such support was infringed upon by the wrongful act of the defendant", as the Court found in the *Hall* case. That right of the wife for such support would have been infringed upon even if her husband was not *killed,* and she would still have been permitted to recover from defendants. Likewise, as the Court continued in the *Hall* case:

> "The same may be said of the Ferreira case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of

> action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right."

Since the father was entitled to the earnings of his son during the son's minority, a right of action could be maintained by the father against the tort-feasor who, by his act deprives the father of that legal right. That legal right is infringed whether there is death or injury not resulting in death. An injury to a lesser degree is a deprivation in a proportionate degree. It is manifest that the infringement of the legal right is what gives rise to the cause of action, and not a requirement that there be death as Appellant contends.

The Court in *Hall v. Kennedy,* supra, made it clear that where a legal right is infringed, a right of action may be maintained. A legal right is infringed whether there is death or injury not resulting in death. And, so the Court said in the *Hall* case:

> "Where, however, no legal right is infringed, no right of action may be maintained."

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(2) THE COURT BELOW FOLLOWED THE COMMON LAW AS REQUIRED BY HAWAIIAN STATUTE.

As heretofore set forth in our Argument (1), the common law of Hawaii, regardless of what it might be elsewhere, recognizes a claim for relief which the learned judge of the District Court upheld.

The provision of Section 1, Revised Laws of Hawaii 1945, applicable to this case is not merely that portion

set forth by Appellant on page 11 of his brief. As applicable to this case, said section reads, in part:

> "Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, *except as . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage; . . .*" (as enacted in 1900 at the time of annexation of the Republic of Hawaii as a Territory of the United States.)

In *Kake v. Horton,* 2 Hawaii 209 (1860), the plaintiff, widow of Charlie Pihaole who came to his death by the alleged act of the defendant, brought the action to recover damages for the loss thus sustained by her. The question before the Court was whether an action could be maintained by the widow. The Court could have followed the English common law, under which the action would not lie, as urged by the defendant. However, the Court held:

> "We do not regard the Common Law of England as being in force here eo nomine and as a whole."

Rejecting the English common law on the subject, the Court proceeded to hold that the action can be maintained under the construction given to certain provisions of the Hawaiian statutes, particularly Section 1116 and Section 14 of the Civil Code of 1859. At page 212, the Court held:

> ". . . Judges are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good

> conscience. And, to decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries. We think reason and natural justice are clearly in favor of permitting an action to be maintained, upon the grounds relied upon in this case, and upon a resort, for light, to the laws of those countries, to whose authority and opinions we yield the highest veneration, we find that the old harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with justice and with the sentiments and circumstances of an enlightened age. *As we are not fettered by the English common law rule on the subject,* no legislative enactment is required to remove that obstacle to the maintenance of an action like the present in a Hawaiian Court, and we think it ought to be permitted, as being consonant with natural law and reason, as well as with the laws of civilized countries."

In other words, the English common law on the subject was specifically rejected and was never the law in Hawaii. And while the limitations placed on the Hawaiian common law by *Hall v. Kennedy,* supra, may have been correct, as cited by appellant on page 13 of his brief, the statement in the ruling in the *Hall* case:

> "The cases of Kake v. Horton and Ferreira v. Hon. R. T. & L. Co. above cited are undoubtedly authority for the proposition that, as 'fixed by Hawaiian judicial precedent' the common law rule denying a right of action to a widow for the

> wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been *abrogated* in this jurisdiction. . . ."

is incorrect to the extent that the English common law rule on the subject was never "abrogated", in the strict sense of the word, since it was never the law in Hawaii. (The quotation appearing on page 13 of Appellant's Brief is from *Hall v. Kennedy,* 27 Haw. 626, and not the *Ferreira* case as appellant notes.) While under the English common law a husband could recover for the loss of his wife's society and the distress of mind he had suffered on her account by reason of injuries sustained by her, from the time of the injury until the moment of her dissolution (see *Baker v. Bolton,* supra), he could not complain of her death resulting from such injuries. The Court took cognizance of the *Baker* case in ruling on the *Kake* case. Can it be said that the Court in *Kake v. Horton,* supra, after finding "that the old harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with justice and with the sentiments and circumstances of an enlightened age," permitted a cause of action for the death, and then stepped back into feudal times to disallow recovery to a husband for the loss of his wife's society from the time of injury until the moment of her dissolution? Yet this is the construction appellant urges upon this learned Court.

Appellant urges that Section 14 of the Civil Code, 1859, which permitted judges to apply "necessary re-

medies to evils not specifically contemplated by law" had been repealed by Act 57, S.L. 1892, by what is now Section 1, Revised Laws of Hawaii 1945. As heretofore cited, Section 1 declared the common law of England, as ascertained by English and American decisions, to be the common law of the Territory of Hawaii, *"except as fixed by Hawaiian judicial precedent, or established by Hawaiian usage."* The Hawaiian common law on the subject matter of this case, was fixed by the precedent of the *Kake* case, and has been established by Hawaiian usage, as shown in Argument (1) of this Brief for Appellees, and is the law in Hawaii—it is not the English common law, or that ascertained by American decisions, but a unique law which Appellees refer to herein as the Hawaiian common law.

In re Estate of Banning (1894), 9 Haw. 453, at 461 and 462, the Court rejected the common law of England that forbade the investment of trust funds in any securities except real estate mortgages and public bonds, and announced the more liberal rule (also the rule in several states) that no statutory provisions, limiting the investment of trust funds to specific securities, existed in Hawaii, and held that it would go no further than to hold that the trustee must act with honesty, prudence, faithfulness, and exercise of sound discretion in placing trust funds for investment.

In re Guardianship of Anna T. K. Parker (1902), 14 Hawaii 347, the Appellant therein made the same contention Appellant in the case at bar urges. In the *Parker* case, it was contended that the decision in the

Banning case, supra, was not binding since that decision was rendered prior to the annexation of the Hawaiian Islands to the United States and none of the decisions of the Court rendered before annexation were controlling except those construing statutes continued in force by the Organic Act or such as may have become rules of property. The Court held:

> "This is not the view that this Court as now constituted has taken of those decisions. Nor is it the view of the *United States District Court for the Territory or the United States Circuit Court of Appeals for the Ninth Circuit.* (See The Schooner Robert Lewers Co. v. Kamaka Kekauoha, 114 Fed. 849). It was held by the former court, in the case last cited at nisi prius and by the latter court on appeal that a decision of the Supreme Court of the islands rendered in 1860, contrary to the common law, (sustaining an action by the widow for damages for the death of her husband, no such action could be maintained at common law) was a part of the law of the Territory of Hawaii. What the court of appeal said in that case is pertinent here.
>
> " 'As will have been observed, the Supreme Court there expressly declared: "The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom." Such judicial modification of the common law the legislature of Hawaii has expressly sanctioned and ratified by section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was in turn sanctioned and ratified by Section 1 of the Act of Congress of April 30, 1900, above set out. There was there-

> fore statutory authority for the right asserted and sustained by the court below.' " (p. 854)

And so the Court held in the *Parker* case that the rule announced in the *Banning* case has been the law of Hawaii on that subject since the date of the decision (April 25, 1894), and would continue such until overruled by the Supreme Court of Hawaii or until a different rule is made by legislative enactment. Appellees herein urge that the rule announced in the *Kake* case, supra, and extended in the cases hereinbefore cited, is the rule applicable in the case at bar, and that the learned judge of the Court below followed the common law as required by Section 1, Revised Laws of Hawaii 1945.

Appellant states, at page 17 of his brief:

> "It is true that the complaint here contained allegations of loss of support, but any loss of support is, of course, only a consequence of injury to the parent and, since the parent can, and here did (R. 20, 21), recover for all the injuries which he or she suffered, the allegations of loss of support do not make the claim for relief a good one."

The jury in the case at bar returned general verdicts without specifying the amounts awarded for appellees' specific losses or for their mother's specific losses. There is no manner in which it can be mathematically ascertained that the jury awarded their mother a fixed amount for her loss of income, since under the evidence of the case (not a part of the record in this appeal), and under the pleadings, the

jury would have been warranted in returning a verdict in favor of the mother substantially in excess of $40,000.00 for her loss of income alone. Appellees do not question that the jury allowed their mother certain special damages for her medical expenses, and still other damages for her pain and suffering, both present and future, which would reduce the amount awarded for loss of her income to something substantially less than the verdict awarded her. As stated in Appellant's brief, the action by the mother and the action of appellees were consolidated for trial (R. 27). The jury had the issues of both cases before them, and under our system of jurisprudence, until the contrary is shown, we must assume that the jury considered all the facts and the law as given by the Court. The jury in this case may have found the mother entitled to $10,000 for her loss of income, but reduced the award to her by $5,000, and awarded the difference to appellees as part of the verdict to them. There is no indication whatsoever that the jury awarded double damages in finding the mother's loss of income at a fixed amount, and then awarded the same amount to appellees as loss of support. The instructions of the learned Judge of the lower Court are not being attacked on this appeal, and it must be presumed that the jury was properly instructed as to the awards for loss of income and loss of support. Appellant implies that the mother in this case was fully compensated for her loss of income. Perhaps the jury, although finding that there was loss of income on her part, awarded her nothing and made the award to the children instead as loss of support.

However minor, such a flagrant misstatement by appellant should not be left unanswered.

In this class of case, the Hawaiian Court has held that:

> "While . . . pecuniary damages are the limit of recovery, they include compensation for losses which are difficult of exact estimation and to which no standard of value may be applied and the damages for which are and necessarily must be left to the sound discretion of the trier of the facts."
>
> *Gabriel v. Margah* (1947), 37 Hawaii 571.

The appellant's argument of practical consequences of "doubt" and "discomfiture" to the wrongdoer respecting settlements of tort claims are ever present, and the Courts are constantly burdened with decisions resolving the doubts and discomfitures of wrongdoers —that is the routine business of courts of law. These arguments, and others, which are averted to in 83 Penn. Law Review, 267-277, and satisfactorily disposed of in 20 Cornell Law Quarterly, 255-257, issue a challenge to the Courts to recognize the valid claim of a child who is wronged by the denial of his mother's support, love and care which has been acknowledged in England and America as one of the best foundations for his entire life's success and happiness. These so-called practical difficulties are mere subterfuge, as the *real issue* posed by this appeal is whether a child has a cause of action for the injury to his rights in his relationship with his mother, as distinguished from the *false issue* whether the wrong-

doer should be inconvenienced by "discomfiture" or "doubt" in the wrong done to a child.

CONCLUSION.

For the reasons set forth above, the judgment below should be affirmed.

Dated, Honolulu, Hawaii,
May 11, 1956.

Respectfully submitted,
ARTHUR K. TRASK,
Counsel for Appellees.

(Appendix Follows.)

Appendix.

Appendix

STATUTES

Sec. 14, Civil Code of 1859.

The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries.

Sec. 1, R.L.H. 1945.

Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

CHILDREN

Sec. 12264, R.L.H. 1945.

Parents' control and duties; binding out of children by judge. Parents, or, in case they be both dead, guar-

dians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right, at all times, to recover possession of their children by habeas corpus, and to chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character, to be well supported, trained to good habits, and taught at least the rudiments of knowledge.

DUTY OF ADULT CHILDREN

Sec. 3044A, R.L.H. 1925 (now Sec. 12290, R.L.H. 1945)

Support of indigent parents. The adult children of any person who for any reason is incapable of self-support shall be liable, to the extent of their financial ability, for the support of such person. Upon information of the attorney general or any county or city and county attorney, or upon the sworn complaint of any person in charge of any public or private hos-

pital or institution for the care of indigent persons, or of any other person, or of such indigent person himself, of his own knowledge or upon information or belief, as the case may be, setting forth that such person is indigent and incapable of self-support and has a child or children (giving their names and addresses as far as known) financially able to support such indigent person, filed in the circuit court of any circuit wherein such children or any of them reside, or in which such indigent person is at the time, the judge of said court may cite such children or any of them to appear before him to show cause why they should not pay such sum or sums as may be in the discretion of the judge necessary for the maintenance and support of such indigent person. If after due hearing the judge shall find that such person is indigent and incapable of self-support in whole or in part, as the case may be, the judge may make such order or orders from time to time and upon such terms and conditions as he may prescribe for the maintenance and support of such indigent person as he may deem necessary and reasonable, having due regard to the needs of such indigent person and the financial status of such children or any of them and all of the circumstances of the case, and may enforce such order or orders by summary process.

It shall be the duty of the attorney general, or the county or city and county attorney, to prosecute all proceedings arising under this section.

TORT ACTIONS

Parties: Death by Wrongful Act.

Sec. 2681, R.L. 1925 (as enacted, c. 245, s. 1, Session Laws of Hawaii 1923)

When the death of a person is caused by the wrongful act or neglect of another, any person who was wholly or partly dependent upon such decedent and who has no remedy for compensation under the provisions of chapter 209, may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. In every action under this section such damages may be given as under all the circumstances may be just. Such action must be commenced within one year after the injury which caused the death.

Sec. 10486, R.L.H. 1945 (under which Ginoza v. Takai Elec. Co., 40 Hawaii 691 (1955) was decided).

Action by dependent, when. When the death of a person is caused by the wrongful act or neglect of another, any person who was wholly or partly dependent upon such decedent may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. Where there is more than one person wholly or partly dependent upon such decedent, any action that may be brought shall be brought by all of such dependents or by one or more of such dependents for the benefit of all the dependents, but

only one action may be brought and one recovery had. In every action under this section such damages may be given as under all the circumstances may be just and the trial court shall apportion the damages given among all the dependents. In the action the court shall cause notice to be given of the pendency thereof to all known dependents who have not joined therein. Such action must be commenced within two years after the injury which caused the death; provided, however, that nothing in this section shall be construed as authorizing any action to be maintained hereunder against the employer of such decedent in any case where any dependent of the decedent has a remedy for compensation under the provisions of chapter 77.

Sec. 10486, R.L.H. 1945, as amended by Act 205, Session Laws of Hawaii 1955 (effective May 27, 1955).

Death by wrongful act. When the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, the deceased's legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person or corporation causing the death or against such person or corporation responsible for such death, on behalf of the persons hereinafter enumerated.

In any such action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (a) loss of society, companion-

ship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action be brought pursuant to this section and a separate action brought pursuant to section 10497, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person.